BRB Nos. 03-0563
and 03-0563A

MICHAEL V. DYE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
TIMCO, INCORPORATED	)	DATE ISSUED: May 20, 2004
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Michael V. Dye, Moss Point, Mississippi, *pro se.*

Michael J. McElhaney, Jr. and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2002-LHC-328) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an electrician, injured his neck and shoulders at work on August 27, 1999. Claimant worked in a light-duty position in employer's tool room from August 29 until October 19, 1999, when he was discharged from its facility. Employer voluntarily paid claimant temporary total disability benefits from November 11, 1999, through October 4, 2000. In his decision, the administrative law judge initially found that employer was under a continuing obligation to provide claimant with the availability of suitable alternate employment because it discharged him for reasons related to his work injury. The administrative law judge also found that claimant reached maximum medical improvement on December 4, 2000, that employer established the availability of suitable alternate employment on September 27, 2000, and again on December 9, 2002. The administrative law judge also found that claimant did not establish diligence in pursuing alternate employment opportunities. Consequently, the administrative law judge awarded claimant temporary total disability benefits from August 27, 1999, through September 26, 2000, temporary partial disability benefits from September 27 through December 3, 2000, and ongoing permanent partial disability benefits from December 4, 2000. The administrative law judge calculated claimant's average weekly wage as $597.22 under Section 10(c) of the Act, 33 U.S.C. §910(c).

The administrative law judge further found that claimant's initial free choice of physician was Dr. Longnecker who referred claimant to Dr. Smith, and that claimant failed to request a change of physicians to Dr. Fleet. The administrative law judge lastly found that claimant failed to establish his discriminatory discharge claim pursuant to Section 49 of the Act, 33 U.S.C. §948a.

On appeal, employer challenges the administrative law judge's award of disability benefits. Claimant, without the assistance of counsel, challenges the administrative law judge's calculation of his average weekly wage.

Employer argues that the administrative law judge erred in finding that claimant's post-injury light-duty job in its tool room was not suitable alternate employment. Once, as here, claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a suitable position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). A job which claimant is not physically qualified to perform is not suitable. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

The administrative law judge rationally found that claimant's post-injury light-duty job in employer's tool room was not suitable alternate employment because there is

no evidence establishing the nature and terms of the position.[1] The administrative law judge credited claimant's testimony, as corroborated by his medical records, that he was physically unable to perform the job, and he rejected the testimony of Mr. Knowles, employer's health and safety director, that the job was within claimant's restrictions. *See generally Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed. Appx. 126 (5th Cir. 2002); Decision and Order at 25-26; Emp. Exs. 8 at 6, 7, 39, 53-55; 9 at 2-3, 5; 10 at 28; 18 at 7-8; Tr. at 32-38. As it is supported by substantial evidence, we affirm the finding that employer did not establish that the job at its facility was suitable for claimant.

Employer next contends that the administrative law judge erred in finding that claimant was discharged from his post-injury light-duty employment in its tool room for reasons related to his work-related injury. Employer contends that claimant was terminated for violating its absentee and call-in rules and that the administrative law judge erred in finding that claimant's violation of these rules was due to his injury.

The administrative law judge discussed and weighed employer's personnel records as well as claimant's testimony and medical records, and rationally found that claimant's ongoing shoulder and neck pain were the cause of his failure to arrive at work timely, if at all, and when at work, made it difficult for claimant to perform his modified job. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 26; Emp. Exs. 8 at 1-12; 10 at 9, 28, 31; Tr. at 32-38. Consequently, as claimant was discharged from an unsuitable position for reasons related to his injury, we affirm the administrative law judge's finding that employer was under a continuing obligation to provide claimant with suitable alternate employment as it is in accordance with law. *See generally Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Employer also argues that the administrative law judge erred in his findings that jobs at Friede Goldman, M K Production, and as casino card dealers are not suitable. The administrative law judge rationally found that claimant's post-injury job with M K Production was sheltered and not suitable, accepting as persuasive claimant's testimony that his brother-in-law obtained the job for him, that he was required to do nothing on the job, and that its purpose was simply to obtain Christmas money. *See generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Brown v. Pac. Dry Dock*, 22 BRBS 284 (1989); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); Decision and Order at 26-27; Tr. at 58-60, 71, 89-90. The administrative law judge also rationally found that the card dealing jobs at the casinos are not suitable because they require

[1] The record establishes only that claimant was provided a light-duty job in employer's tool room. Emp. Ex. 18 at 8; Tr. at 34.

unpaid training. *Sutton v. Genco, Inc.*, 15 BRBS 25, 27 n. 3 (1982); *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21, 29 (1979), *aff'd*, 638 F.2d 1232 (5th Cir. 1981); Decision and Order at 27; Emp. Ex. 24; *see generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Lastly, the administrative law judge rationally found that the light duty electrician job at Friede Goldman does not constitute suitable alternate employment because the record does not contain a specific description of this job, and thus he could not determine whether its duties are within claimant's restrictions. *See Carlisle v. Bunge Corp.*, 33 BRBS 133, 140 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); Decision and Order at 14-15, 30; Emp. Ex. 16 at 15-16, 28. Thus, we affirm the administrative law judge's findings that employer did not establish the availability of suitable alternate employment through the jobs at Friede Goldman and M K Production, or the card dealing jobs at the casinos, as they are rational and supported by substantial evidence.[2] Consequently, the administrative law judge properly excluded these jobs from his calculation of claimant's post-injury wage-earning capacity.[3] *See Cooper*, 33 BRBS at 52-53.

We next address claimant's specific challenge to the administrative law judge's average weekly wage calculation. Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910(a)-(c). *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Section 10(c) is used when Section 10(a) or (b) cannot fairly or reasonably be applied. *Id*. Under Section 10(c), the administrative law judge need not employ a specific method of calculation and has broad discretion in calculating claimant's average weekly wage based on a variety of factors. *See generally Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998).

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[2] As claimant is *pro se*, we have reviewed the administrative law judge's finding that employer established the availability of suitable alternate employment by virtue of the other jobs employer identified in labor market surveys dated September 27, 2000, and December 9, 2002. The administrative law judge's findings in this regard are rational, are supported by substantial evidence, and are affirmed. *Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); Decision and Order at 11, 26-31; Emp. Exs. 13 at 13, 26; 16 at 11-17, 26-28; 24; 25; Tr. at 48-64. We also affirm his rational finding that claimant did not diligently seek alternate employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000).

[3] The administrative law judge based claimant's post-injury wage-earning capacity on the average of the wages paid by the jobs he found suitable for claimant, adjusted for inflation. This finding is rational, is supported by substantial evidence, and is affirmed. *Avondale Indus., Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996).

The administrative law judge rationally found that Section 10(a) and (b) could not fairly and reasonably be applied because claimant only worked for employer for two weeks pre-injury, which is not substantially the whole of the year, and because there was insufficient evidence to establish whether other first class electricians who worked for employer were similarly situated to claimant. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Hall*, 139 F.3d 1025, 32 BRBS 91(CRT); Decision and Order at 32-33; Emp. Exs. 8 at 17; 18 at 8-11. Applying Section 10(c), the administrative law judge calculated claimant's average weekly wage as $597.22 based on the earnings in his two-week employment with employer and his pre-injury earnings with Floore Industrial Contractors. The administrative law judge added $2,438 to $16,672.88 and rationally divided by 32, the number of weeks claimant worked pre-injury in 1999. *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 35 BRBS 26(CRT)(5th Cir. 2000); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); Decision and Order at 34, 35; Emp. Exs. 7 at 3; 19 at 2.

The administrative law judge considered claimant's earnings from 1992-1998 but rationally found that they were not fair or reasonable approximations of claimant's earning capacity at the time of injury.[4] *See generally Hall*, 139 F.3d 1025, 32 BRBS 91(CRT); *Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT); Decision and Order at 34-35; Emp. Ex. 26. The administrative law judge correctly stated at the hearing that the average weekly wage calculated by the claims examiner is not binding, *see* 20 C.F.R. §§702.316-702.318, and rationally declined to rely on the testimony of Mr. Prevost regarding claimant's 1998 earnings with Prevost Industries because there was no other evidence documenting these earnings. *See Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999); Tr. at 83-89. Thus, we affirm the administrative law judge's calculation of claimant's average weekly wage as $597.22 pursuant to Section 10(c) because it is rational and supported by substantial evidence.[5]

[4] Claimant's earnings during 1992-1998, according to his Social Security Administration records, were varied. Emp. Ex. 26. Claimant earned over $26,000 in 1996, but earned as little as just over $2,000 in 1995.

[5] We affirm the administrative law judge's finding that claimant did not seek authorization to treat with Dr. Fleet as he rationally relied on the testimony of employer's insurance adjuster that claimant did not request such authorization. 33 U.S.C. §907(b), (c)(2); *Slattery Assocs., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44(CRT)(D.C. Cir. 1984); 20 C.F.R. §702.406(a); Decision and Order at 37; Tr. at 66-70; Emp. Ex. 17 at 6, 10. We also affirm the denial of claimant's Section 49 claim, as the administrative law judge rationally found that claimant was not treated any differently than others who violated employer's absentee and call-in policies. 33 U.S.C §948a; *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Holliman v. Newport News*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

Shipbuilding & Dry Dock Co., 852 F.2d 759, 21 BRBS 124(CRT)(4th Cir. 1988); Decision and Order at 37-40; Emp. Exs. 8 at 1-16.